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In the Supreme Court of the United States

OCTOBER TERM, 1968

CHARLES H. COX, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the district court be affirmed.

STATEMENT

This is an appeal from the unanimous decision of a three-judge district court (J.S. App. 1a-14a) sustaining certain orders of the Interstate Commerce Commission which denied appellants' applications for mo-

tor common carrier certificates under the Interstate Commerce Act.[1]

Appellants are three individuals who have unsuccessfully attempted, for more than 30 years, to obtain authority to operate as common carriers by motor vehicle. In February 1936, they filed two applications seeking such authority under the "grandfather" clause of Section 206(a)(1) of the Motor Carrier Act of 1935,[2] which authorizes certification, without proof of public convenience and necessity, for *bona fide* operations that had been conducted prior to June 1, 1935. The applicants failed, however, to respond to the Commission's request to submit the requisite evidence of prior *bona fide* operations, and in 1938 the applications were dismissed for want of prosecution (J.S. App. 4a).[3]

After passage of the Transportation Act of 1958, appellants sought "grandfather" authority under Section 7(c) of that Act[4] to transport, between all points in the United States, certain previously exempt commodities which the Act brought within the Commis-

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[1] The opinion of the district court is not yet reported.

[2] 49 U.S.C. 306(a)(1).

[3] A third application dating from that period sought a contract-carrier permit to transport certain named commodities pursuant to Section 209(b) of the Act (49 U.S.C. 309(b)). After a full hearing, the Commission denied the application on the ground that the proposed operations would not be in the public interest (Cox Contract Carrier Application, 14 M.C.C. 777). Appellants took no appeal from that decision and do not challenge it here.

[4] 72 Stat. 573, 49 U.S.C. following 303(b)(6).

sion's regulatory authority. Their five applications [5] were consolidated, and hearings were conducted in Kansas City, Missouri, in October 1959 and December 1960. Appellants appeared without counsel, and protesting motor and rail carriers appeared in opposition.

At the first of these hearings, appellants' only evidence consisted of an insurance policy and five suitcases containing gasoline and weight receipts that were either undated or bore dates between 1953 and 1954 and contained no information as to the origin, destination, or nature of the transported commodities. According to Commission Rule 1.83 (49 C.F.R. (1963 rev.) 1.83), appellants were allowed to read into the record, ten representative documents.[6] Appellants did not, however, comply with the examiner's request that an abstract of this evidence be prepared and presented at the next hearing, held over a year later. No further evidence was offered, and the Commission, adopting the findings and conclusions of the hearing examiner, held that appellants had failed to prove *bona fide* operations bracketing the critical date, May 1, 1958, and accordingly denied the applications in an order dated July 3, 1961.

Appellants then commenced this proceeding for review of the Commission's 1938 and 1961 orders. Although a district judge advised them to obtain legal counsel, they insisted on proceeding *pro se* (see J.S.

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[5] Docket Nos. MC-118267 (Charles H. Cox); MC-118268 (D.E. Cox); MC-118669 (J. L. Cox); MC-118670 (James H. Cox); and MC-61924 (Sub-No. 1) (Claude G. Cox).

[6] The one commodity specified on any of the ten slips was grapefruit, a commodity not covered by Section 7(c).

13; J.S. App. 2a). The three-judge district court, reading appellants' pleadings liberally and reviewing the record carefully in the light of their *pro se* status (J.S. App. 2a), unanimously granted the government's motion for summary judgment and dismissed the action (J.S. App. 1a-14a).

ARGUMENT

1. The standards applicable to appellants' applications for grandfather rights are well settled (see, *e.g.*, *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475; *Willis Shaw Frozen Food Express, Inc.* v. *United States*, 377 U.S. 159), and appellants raise no question as to the correctness of their application by the Commission. The Commission determined that appellants had failed to establish that they were engaged in substantial operations on the "grandfather" dates[7] and, therefore, were not entitled to motor carrier certificates without proof that the public convenience and necessity required their operations. After extensive review, the court below properly determined that this

[7] With respect to the 1958 applications, appellants Claude G. Cox and J. L. Cox conceded that neither had engaged in transportation of the involved commodities on May 1, 1958, the "grandfather" date, or thereafter. Operations terminated prior to this date are insufficient to establish claims to "grandfather" rights (*Gregg Cartage Co.* v. *United States*, 316 U.S. 74; *United States* v. *Maher*, 307 U.S. 148, 154-155); inability to obtain customers, which these appellants advanced, is not considered to be an excusable "interruption of service over which [an] applicant had no control" (*Gregg Cartage Co.* v. *United States*, *supra*, 316 U.S. at 80-83; *Melman* v. *United States*, 231 F. Supp. 503, 506 (S.D. Iowa)).

finding was adequately supported by the record.[8] *Colonial Refrigerated Transportation, Inc.* v. *United States*, 255 F. Supp. 999, affirmed, 386 U.S. 480; *Exley Express, Inc.* v. *United States*, 385 U.S. 371; *Battaglia* v. *United States*, 385 U.S. 115; *Lester C. Newton Trucking Co.* v. *United States*, 264 F. Supp. 869 (D. Del.), affirmed, 389 U.S. 30.

2. Appellants' various challenges to the regulatory scheme governing the motor carrier industry are insubstantial. They claim that the Seventh Amendment guaranteed them a jury trial in the proceedings to determine "grandfather" rights. But that Amendment applies to actions "at common law" and here Congress permissibly chose an administrative forum for the determination of such rights.[9] See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49.

Appellants next contend that the "grandfather" statutes are unconstitutional *ex post facto* laws. The thrust of their claim is that a right to continue motor carrier operations vests in perpetuity if any operations were conducted prior to commencement of public regulation of that industry. But by recognition of "grandfather" rights for such continuing and *bona*

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[8] The district court observed that it was impossible to say whether, with the assistance of legal counsel, appellants might have demonstrated some merit to their claims (J.S. App. 13a). We point out, however, that the refusal to retain counsel was deliberate, and apparently not compelled by poverty (see J.S. 13). In addition, the two hearing examiners repeatedly sought to assist appellants in adducing and presenting any relevant evidence they might have had to support their claims (see J.S. App. 6a-9a).

[9] Motor Carrier Act, § 206(a), 49 U.S.C. 306(a).

fide operations, Congress has made adequate provision for carriers engaged in substantial operations prior to the commencement of administrative regulation. See *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 409-411 (D. Del.); cf. *Stephenson* v. *Binford*, 287 U.S. 251, 264.

Appellants also argue that the burden of proving that they were not in *bona fide* operation on the "grandfather" dates should rest on the Commission, on the theory that appellants were really "defendants". This argument misapprehends the nature of proceedings involving application for agency authority. Moreover, since the facts concerning prior operations are entirely within the hands of the applicant, it would be impossible for the Commission to prove the negative in grandfather cases. Thus the statutory scheme validly places the burden of proving such operations upon the applicant. *Alton R. Co.* v. *United States*, 315 U.S. 15, 25; *United States* v. *Maher*, 307 U.S. 148, 155; *Willis Shaw Frozen Food Express, Inc.* v. *United States, supra.*

Appellants assert that they never received notice of the Commission's 1938 show cause orders or the final orders of dismissal of the two 1936 applications. The Commission's records, however, indicated that appellants were served by registered mail at the most recent address furnished to the Commission by them and that the applicants' authorized agent was served by ordinary mail (J.S. App. 4a-5a).

3. The Commission's orders and the lower court's opinion leave no doubt that the appellants were accorded every opportunity to establish their rights to

"grandfather" authority under the 1935 and 1958 legislation. Indeed, the record manifestly shows that the Commission and the lower court extended every assistance to the appellants in seeking to establish their claims. Those claims have been properly denied and raise no significant legal issues.[10]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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[10] Appellants' miscellaneous contentions—*e.g.*, that Congress lacks power to regulate interstate trucking and that certificates of public convenience and necessity constitute prohibited titles of nobility—do not warrant discussion.

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